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8                   **UNITED STATES DISTRICT COURT**  
9                   **SOUTHERN DISTRICT OF CALIFORNIA**

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11     MARK ALLCHIN and DAVID FOSTER,  
12     individuals, on behalf of all others  
13     similarly situated,

14                   Plaintiffs,

15     v.

16     VOLUME SERVICES, INC. dba  
17     CENTERPLATE and DOES 1-100,  
18     inclusive,

Defendants.

Case No.: 3:16-cv-00488-H-KSC

**ORDER DENYING MOTION FOR  
CLASS CERTIFICATION**

[Doc. No. 48]

19     On March 16, 2015, Plaintiffs Mark Allchin and David Foster (“Plaintiffs”) filed a  
20     putative class action in the County of Sacramento Superior Court of California against  
21     Defendant Volume Services, Inc. (“Defendant”). (Doc. No. 1-3.) On April 24, 2015, the  
22     suit was removed to the Federal District Court for the Eastern District of California.  
23     (Doc. No. 1.) Plaintiffs filed the operative First Amended Complaint (“FAC”) on May  
24     22, 2015. (Doc. No. 7.) The FAC alleged that Defendant violated various California  
25     employment laws when it failed to properly compensate employees for their overtime  
26     work. (See id.) On February 24, 2016, the case was transferred to the Federal District  
27     Court for the Southern District of California. (Doc. No. 22.) On March 13, 2013,  
28     Plaintiffs filed a motion for class certification. (Doc. No. 48.) At the parties’ request, the

1 Court continued the hearing on Plaintiffs' motion until July 31, 2017. (Doc. Nos. 52, 56.)  
2 Defendant filed an opposition to Plaintiffs' motion for class certification on July 17,  
3 2017. (Doc. No. 58.) Plaintiffs filed a reply on July 24, 2017. (Doc. No. 59.)

4 **BACKGROUND**

5 Defendant is a hospitality service company providing concessions to various  
6 venues across the United States and Canada. (Doc. No. 58-1 at 2, ¶ 2.) Defendant  
7 provides concessions at seven locations in California, including stadiums, golf courses,  
8 convention centers, and a zoo. (Id. ¶¶ 3, 10.) Defendant employs non-exempt employees  
9 in nearly 80 different positions. (Id. ¶ 8.) Some of these positions are eligible to receive  
10 service charges as part of their compensation. (Id. ¶ 12.)

11 Plaintiffs are employees of Defendant. Mark Allchin has been employed by  
12 Defendant since 1993 and has worked exclusively at the San Diego Convention Center  
13 and Qualcomm Stadium. (Id. ¶ 14.) David Foster has been employed by Defendant since  
14 2011 and also worked exclusively at the San Diego Convention Center and Qualcomm  
15 Stadium. (Id. ¶ 18.)

16 Plaintiffs allege that Defendant has failed to properly compensate employees for  
17 their overtime and improperly provided employees with inaccurate paystubs. (See Doc.  
18 No. 7 ¶¶ 39, 59.) Plaintiffs filed this case as a purported class action and now seek to  
19 certify three classes, including one subclass.

20 **DISCUSSION**

21 **I. LEGAL STANDARD**

22 In order to maintain a class action, Plaintiffs bears the burden of showing they have  
23 satisfied the prerequisites of Federal Rule of Civil Procedure 23(a), as well as one of the  
24 prongs of Rule 23(b). Fed. R. Civ. P. 23; Zinser v. Accufix Research Inst., Inc., 253 F.3d  
25 1180, 1188 (9th Cir. 2001). “Rule 23 does not set forth a mere pleading standard. A  
26 party seeking class certification must affirmatively demonstrate his compliance with the  
27 Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous  
28

1 parties, common questions of law or fact, etc.” Wal-Mart Stores, Inc. v. Dukes, 564 U.S.  
2 338, 351 (2011) (emphasis in original).

3 “The class action is ‘an exception to the usual rule that litigation is conducted by  
4 and on behalf of the individual named parties only.’” Dukes, 564 U.S. at 348 (quoting  
5 Califano v. Yamasaki, 442 U.S. 682, 700-01 (1979)). As such, district courts must  
6 conduct a “rigorous analysis” to ensure each of the Rule 23 prerequisites have been met.  
7 Zinser, 253 F.3d at 1186. Determining whether the Rule 23 prerequisites have been met  
8 may require some analysis of the underlying claims. Dukes, 564 U.S. at 351 (“class  
9 determination generally involves considerations that are enmeshed in the factual and  
10 legal issues comprising the plaintiff’s cause of action”). However, district courts should  
11 limit any analysis of the merits to that necessary for assessing the Rule 23 requirements.  
12 Id.; Ellis v. Costco Wholesale Corp., 657 F.3d 970, 981 (9th Cir. 2011). If the court is  
13 not fully satisfied that the requirements of Rule 23 have been met, certification should be  
14 denied. Gen. Tel. Co. v. Falcon, 457 U.S. 147, 161 (1982).

15       **A. Rule 23(a) Prerequisites**

16       The party seeking certification bears the burden of showing they satisfy each of the  
17 four requirements of Rule 23(a): numerosity, commonality, typicality, and adequacy of  
18 representation. Zinser, 253 F.3d at 1186.

19       Numerosity requires “the class [be] so numerous that joinder of all members is  
20 impracticable.” Fed. R. Civ. P. 23(a)(1). This “requires examination of the specific facts  
21 of each case and imposes no absolute limitations.” Gen. Tel. Co. of the Nw., Inc. v.  
22 Equal Employment Opportunity Commission, 446 U.S 318, 330 (1980). “The central  
23 question is whether Plaintiffs have sufficiently identified and demonstrated the existence  
24 of the numbers of persons for whom they speak.” Schwartz v. Upper Deck Co., 183  
25 F.R.D. 672, 680-81 (S.D. Cal. 1999).

26       Commonality is established where “there are questions of law or fact common to  
27 the class.” Fed. R. Civ. P. 23(a)(2). “All questions of fact and law need not be common  
28 to satisfy the rule.” Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998).

1 Plaintiffs must show, however, that the class members ‘have suffered the same injury.’”  
2 Dukes, 564 U.S. at 350 (quoting Gen. Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 157  
3 (1982)). This means that class members’ claims must depend upon a “common  
4 contention . . . of such a nature that it is capable of classwide resolution—which means  
5 that determination of its truth or falsity will resolve an issue that is central to the validity  
6 of each one of the claims in one stroke.” Id.

7       Typicality requires that “the claims or defense of the representative parties are  
8 typical of the claims or defenses of the class.” Fed. R. Civ. P. 23(a)(3). This tests  
9 “whether other members have the same or similar injury, whether the action is based on  
10 conduct which is not unique to the named plaintiff, and whether other class members  
11 have been injured by the same course of conduct.” Wolin v. Jaguar Land Rover N. Am.,  
12 LLC, 617 F.3d 1168, 1175 (9th Cir. 2010) (internal quotation marks omitted). “The  
13 purpose of the typicality requirement is to assure that the interest of the named  
14 representative aligns with the interests of the class.” Hanon v. Dataproducts, Corp., 976  
15 F.2d 497, 508 (9th Cir. 1992).

16       Finally, the adequacy requirement is met by showing “the representative parties  
17 will fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a)(4).  
18 This involves two inquiries: “(1) do the named plaintiffs and their counsel have any  
19 conflicts of interest with other class members and (2) will the named plaintiffs and their  
20 counsel prosecute the action vigorously on behalf of the class?” Hanlon, 150 F.3d at  
21 1020.

22           **B. Rule 23(b)(3)**

23       As Plaintiffs seek to certify their classes pursuant to Rule 23(b)(3), they must also  
24 show “that the questions of law or fact common to class member predominate over any  
25 questions affecting only individuals members, and that a class action is superior to other  
26 available methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P.  
27 23(b)(3). These two requirements are referred to as “predominance” and “superiority”  
28 and are intended to allow class certification in cases where “a class action would achieve

1 economies of time, effort, and expense, and promote . . . uniformity of decision as to  
2 persons similarly situated, without sacrificing procedural fairness or bringing about other  
3 desired results.”” Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 615 (1997) (quoting  
4 Advisory Committee’s Notes on Fed. R. Civ. P. 23). “Rule 23(b)(3)’s predominance  
5 criterion is even more demanding than Rule 23(a),” Comcast Corp. v. Behrend, 133 S.Ct.  
6 1426, 1432 (2013), and tests “whether proposed classes are sufficiently cohesive to  
7 warrant adjudication by representation.” Amchem Products, Inc. v. Windsor, 521 U.S.  
8 591, 594 (1997).

9 In assessing predominance and superiority, Rule 23(b) provides a non-exclusive  
10 list of factors for courts to consider, including:

- 11 (A)the class members’ interest in individually controlling the prosecution or  
12 defense of separate actions;
- 13 (B)the extent and nature of any litigation concerning the controversy already  
14 begun by or against class members;
- 15 (C)the desirability or undesirability of concentrating the litigation of the  
16 claims in the particular forum; and
- 17 (D)the likely difficulties in managing a class action.

18 Fed. R. Civ. P. 23(b)(3)(A)-(D).

## 19 **II. THE PURPORTED CLASSES**

20 Plaintiffs seek to certify four discrete classes. (Doc. No. 48 at 2-3.) The first class  
21 (hereinafter the “Overtime Class”) includes “all current and former non-exempt  
22 employees of Defendant within the State of California who . . . were compensated, at  
23 least in part, by service charge distributions and who worked overtime hours.” (Id. at 2.)  
24 The second class (the “Late Pay Subclass”) is a subclass of the Overtime Class and  
25 includes any member of the Overtime Class who also “did not receive all their full  
26 overtime wages upon termination or resignation.” (Id.) The third class (the “Inaccurate  
27 Pay Statement Class”) includes “all current and former non-exempt employees of  
28 Defendants within the State of California who . . . were not provided with an accurate,

1 itemized pay statement reflecting (1) all applicable hourly rates in effect during the pay  
2 period and the corresponding number of hours worked by the employee at each hourly  
3 rate, or (2) reflecting the name and address of the legal entity that is the employer.”  
4 Finally, the fourth class (the “UCL Class”) is a derivative class, consisting of all members  
5 of the other classes.

6 The alleged injury to the Overtime Class and the Late Pay Subclass stems from the  
7 claim that Defendant improperly calculated the amount of overtime pay for employees  
8 receiving service charge distributions. Plaintiffs argue that Defendant failed to include  
9 service charges in the calculation of employees’ regular pay rates for purposes of  
10 determining the proper overtime rate. (See Doc. No. 48-1 at 19.) Thus, as a result of this  
11 miscalculation, neither class received their entire compensation.

12 The alleged injury to the Inaccurate Pay Statement Class stems from misstatements  
13 in employee’s pay statements. Plaintiffs argue that employees’ pay statements violated  
14 the California Labor Code because they did not, for example, include all hourly rates or  
15 the name and address of the employer.

16 **III. ANALYSIS**

17 Plaintiffs bear the burden of “affirmatively demonstrat[ing]” they have satisfied all  
18 of the prerequisites of a class action. Dukes, 564 U.S. at 351. Here, Plaintiffs have not  
19 done so. The record before the court is limited to facts concerning the named plaintiffs,  
20 and offers almost no details as to other class members. For example, Plaintiffs have  
21 produced their personal paystubs with alleged miscalculations and misstatements but  
22 have offered no paystubs from other class members or—even though named plaintiffs  
23 only worked at two of the seven California locations. Similarly, Plaintiffs have failed to  
24 address differences between named plaintiffs’ employment and that of other class  
25 members such as differences in unionization and the impact of collective bargaining  
26 agreements. With no evidence regarding other class members, the Court is unable to  
27 assess similarities and differences between named plaintiffs and the classes they seek to  
28 represent. As such, the Court cannot find that Rule 23’s prerequisites are met and must,

1 thus, deny certification. See Falcon, 457 U.S. at 161 (requiring a “rigorous analysis”).  
2 Furthermore, because the discovery deadline has already passed, the Court denies  
3 certification with prejudice.

4 **A. Overtime Class and Late Pay Subclass**

5 Plaintiffs’ proposed Overtime Class includes “all current and former non-exempt  
6 employees of Defendant within the State of California who . . . were compensated, at  
7 least in part, by service charge distributions and who worked overtime hours.” (Doc. No.  
8 48 at 2.) Plaintiffs allege this class shares a common injury stemming from Defendant’s  
9 failure to properly calculate the amount of class members’ overtime pay by not including  
10 class members’ compensation from service charges in the calculation of their overtime  
11 rate. Evidence of this common injury, however, is lacking. As a result, the Court finds  
12 the Plaintiffs have not affirmatively demonstrated the presence of commonality,  
13 typicality, or predominance and denies certification of the Overtime Class and its  
14 subclass.

15           1. Commonality

16 To demonstrate commonality, Plaintiffs must show that class members have  
17 suffered the same injury. Dukes, 564 U.S. at 349-50. “This does not mean merely that  
18 they have all suffered a violation of the same provision of law” but, rather, that the way  
19 in which their rights were violated is common to class members. Id. “Their claim must  
20 depend on a common contention . . . that is capable of classwide resolution.” Id. Here,  
21 Plaintiffs have not demonstrated that class members’ injuries stem from Defendant’s  
22 conduct that was common to class members.

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1 To show that class members sustained a common injury, Plaintiffs have produced a  
2 limited number of their personal paystubs. (Doc. No. 48-3, Exhibits 5-11.) These  
3 include six paystubs for Mark Allchin (“Allchin”) and one paystub for David Foster  
4 (“Foster”). Of these seven paystubs, only two actually include overtime pay—both  
5 belonging to Allchin.<sup>1</sup>

6 Plaintiffs fail to explain how Allchin’s paystubs demonstrate a miscalculation of  
7 his overtime pay, much less a miscalculation common to the entire class. First, only two  
8 of Allchin’s seven paystubs actually include overtime compensation. (See Doc. No. 48-3  
9 at 69, 73.) The first paycheck, dated September 21, 2011, shows that Allchin received  
10 \$26.67 for 1.5 hours of overtime work, or an effective overtime hourly rate of \$17.78.  
11 (Doc. No. 48-3 at 69.) This rate is one and a half times the paycheck’s indicated hourly  
12 rate of \$11.85. The paycheck does include an entry for “Gratuity” but Plaintiffs have  
13 offered no facts establishing this was a service charge that occurred on the same day that  
14 Allchin worked the 1.5 hours of overtime. Similarly, Allchin’s only other paycheck  
15 including overtime pay shows him receiving one and a half times his hourly rate. And  
16 again, Plaintiffs have offered no facts showing that this calculation was incorrect.

17 Aside from Allchin’s paychecks, the only other evidence Plaintiffs have offered of  
18 a miscalculation of overtime pay is a passage of Mr. Winarski’s deposition. (See Doc.  
19 No. 48-1 at 12.) In this passage, Winarski is asked about two exhibits, “Exhibit 15” and  
20 “Exhibit 16.” (Doc. No. 48-3, Winarski Deposition ln. 89:17-90:13.) Although the  
21 preceding portion of the deposition was not included in the record, the premise of the  
22 question posed to Winarski is that Allchin worked three, three-hour shifts on one day but  
23 was not paid overtime. (See id. ln. 89:3-8.) Notably, however, the two exhibits Winarski  
24 was presented with have not been included in the record before the court. And without

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26 <sup>1</sup> Two additional paystubs include entries for CAOTPem, which stands for California Overtime  
27 Premium. (Doc. No. 48-3, Winarski Deposition ln. 34:10-11.) Winarski testified that this payment was  
28 for “when a person works past midnight, their shift goes into midnight, that there is a premium paid.  
(Id. ln. 34:13-15.) Plaintiffs have offered no explanation for whether this premium is legally required  
and, if so, how it was miscalculated.

1 these, it is impossible for the Court to assess the injury. See Dukes, 564 U.S. at 350  
2 (“Rule 23 does not set forth a mere pleading standard.)

3 Furthermore, even if Plaintiffs were able to show that Allchin’s overtime pay was  
4 miscalculated, they have offered no evidence to show that class members other than  
5 Allchin were injured in a common manner. Plaintiffs seek to certify a class containing at  
6 least 2000 individuals. (Doc. No. 48-3, Winarski Declaration ¶ 2.) These class members  
7 are spread out across numerous venues in California, including stadiums, zoos, golf  
8 courses, convention centers, and catering company facilities, and are employed in nearly  
9 80 different positions. (Doc. No. 58-1, Winarski Declaration ¶¶ 2-3, 8.) Notably,  
10 locations differ as to whether workers are unionized and, if so, as to the terms of the  
11 separately negotiated collective-bargaining agreement. (Id. ¶¶ 6-7.) Yet despite these  
12 differences, Plaintiffs offer no evidence of wage miscalculation beyond Allchin’s  
13 paystubs—let alone a miscalculation common to the class.<sup>2</sup> There are no representative  
14 paystubs, no representative payment histories, and no additional class member  
15 declarations. Without more, the Court cannot say that class members’ rights were  
16 violated in a common manner. Dukes, 564 U.S. at 352 (“Without some glue holding the  
17 alleged reasons for all those decisions together, it will be impossible to say that  
18 examination of all the class members’ claims for relief will produce a common answer to  
19 the crucial question.”).

20 Plaintiff’s reliance on the testimony of Winarski does not save the class. Winarski  
21 is Defendant’s Vice President of Human Resources and was deposed as a Person Most  
22 Knowledgeable. (See Doc. No. 48-3, Exhibit 1.) Winarski testified that Defendant’s  
23 policy for calculating overtime policy was reduced to writing in September 2012, (Doc.  
24 No. 48-3, Exhibit 1 ln. 11:14-23), and, although each location calculated overtimes  
25 separately, they all followed the policy, (Id. ln. 46:10-16). Plaintiffs make much of this  
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28 <sup>2</sup> Plaintiffs do offer a paystub belonging to Ken M Aronovsky, but offer no explanation of who his is,  
where he worked, or why the paystub shows a miscalculation.

1 policy, arguing that it supports a finding of commonality. (See Doc. No. 48-1 at 11-12.)  
2 However, they have identified no error in the policy that would lead to a miscalculation  
3 of overtime pay. The policy clearly provides for the inclusion of service charge  
4 compensation in employees' overtime pay and Winarski testified that whenever  
5 employee's received service charges, it was included in the overtime calculations as  
6 necessary. (Doc. No. 48-3, Exhibit 1 ln. 25:4-13.) Without a connection between the  
7 company-wide policy and the alleged injury to class members, the policy alone cannot  
8 support a finding of commonality. As the Supreme Court explained in Dukes, class  
9 members "claims must depend upon a common contention." 564 U.S. at 350. Were  
10 Plaintiffs' contention that the application of Defendants' written policy resulted in a  
11 miscalculation of overtime pay, then certainly this common contention requirement  
12 would be met. But that does not appear to be Plaintiffs' contention—or at least they have  
13 made no showing of how the policy resulted in the class members' injury.

14 The Court notes that this analysis of the commonality prerequisite necessarily  
15 overlaps with the merits of Plaintiffs' contentions. However, such overlap is "a familiar  
16 feature of [class action] litigation" and proper in conducting a "rigorous analysis" of the  
17 Rule 23 requirements. Dukes, 564 U.S. at 351.

18       2. Typicality

19       Typicality requires that "the claims or defense of the representative parties are  
20 typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). "The test of  
21 typicality is whether other members have the same or similar injury, whether the action is  
22 based on conduct which is not unique to the named plaintiffs, and whether the other class  
23 members have been injured by the same course of conduct." Hanon v. Dataproducts  
24 Corp., 976 F.2d 497, 508 (1992) (internal quotation marks omitted); accord Wolin, 617  
25 F.3d at 1175. As the Supreme Court has noted, "[t]he commonality and typicality  
26 requirements of Rule 23(a) tend to merge" but "[b]oth serve as guideposts for  
27 determining whether . . . class claims are so interrelated that the interests of the class  
28 members will be fairly and adequately protected in their absence." Falcon, 457 U.S. at

1 157 n. 13. Because Plaintiffs have offered no evidence of other class members' injuries,  
2 they have failed to establish that named plaintiffs are typical.

3 As the Court previously explained, Plaintiffs have offered almost no evidence  
4 showing that named plaintiffs sustained injuries arising from miscalculated overtime pay.  
5 More importantly, however, with regards to typicality, Plaintiffs have offered no  
6 evidence of how class members, other than named plaintiffs, were injured. As such, the  
7 Court is unable to assess "whether other members have the same or similar injury,  
8 whether the action is based on conduct which is not unique to the named plaintiffs, and  
9 whether the other class members have been injured by the same course of conduct."  
10 Hanon, 976 F.2d at 508. And without assurances of these similarities, there is no way to  
11 ensure "class members will be fairly and adequately protected in their absence." Falcon,  
12 457 U.S. at 157 n. 13.

13       3. Predominance

14       As Plaintiffs seek to certify their class under the third prong of Rule 23(b), they  
15 must show that "questions of law or fact common to class members predominate over any  
16 questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). "Rule 23(b)(3)'s  
17 predominance criterion is even more demanding than Rule 23(a)," Comcast Corp. v.  
18 Behrend, 133 S.Ct. 1426, 1432 (2013), and tests "whether proposed classes are  
19 sufficiently cohesive to warrant adjudication by representation." Amchem Products, Inc.  
20 v. Windsor, 521 U.S. 591, 594 (1997). Plaintiffs have not met this "more demanding"  
21 standard.

22       Plaintiffs have failed to satisfy the commonality requirement because they have  
23 offered no facts showing that class members were injured through a common course of  
24 conduct. As such, they necessarily fail to show that those common questions  
25 predominate over individual ones. Amchem, 521 U.S. at 624 ("the predominance  
26 criterion is far more demanding"). The Court further notes that Plaintiffs have failed to  
27 show that "questions affecting only individual members" will not engulf the case.

28

1       One issue that threatens to splinter resolution of Plaintiffs' overtime claims is the  
2 different collective bargaining agreements governing pay at Defendant's various venues.  
3 In his declaration, Winarski stated that Defendant operates seven facilities in California,  
4 some of which are unionized and some of which are not. (Doc. No. 58-1 ¶¶ 6, 10.)  
5 Unionized facilities each have at least one separately negotiated collective-bargaining  
6 agreements, which addresses overtime pay and service charges. (*Id.* ¶ 6.) Plaintiffs  
7 Allchin and Foster only worked at two of the facilities, the San Diego Convention Center  
8 ("SDCC") and Qualcomm Stadium ("Qualcomm"). (*Id.* ¶ 4.) Both SDCC and  
9 Qualcomm are unionized, but are governed by separate collective bargaining agreements.  
10 (*Id.* ¶ 7.) Whether an employee is covered by a collective bargaining agreement can have  
11 a significant impact on their overtime compensation. See Cal. Lab. Code § 514 ("Section  
12 510 and 511 do not apply to an employee covered by a valid collective bargaining  
13 agreement if [certain conditions are met].") Yet despite this potentially dispositive issue,  
14 Plaintiffs have not addressed its impact on class certification. First, Plaintiffs did not  
15 include Allchin or Foster's collective bargaining agreements in the record and do not  
16 address their impact on Section 510 of California's Labor Code, which forms the basis of  
17 Plaintiffs overtime claims. (See Doc. No. 7, First Amended Complaint ¶¶ 34-39.)  
18 Second, even if the SDCC and Qualcomm collective bargaining agreements do not affect  
19 Plaintiffs' overtime claims, Plaintiffs have offered no information regarding how other  
20 class members' claims are affected by their collective bargaining agreements. Plaintiffs  
21 do not identify which other facilities are covered by collective bargaining agreements,  
22 nor what the terms of those agreements might be. And without this information, there is  
23 no way to know whether common issues will predominate. See Williams v. Boeing Co.,  
24 225 F.R.D. 626, 637 (W.D. Wash. 2005) (finding that grouping hourly employees  
25 covered by multiple agreements would be unmanageable and declining to certify  
26 subclasses because plaintiffs did not provide sufficient information regarding the  
27 agreements' coverage). Furthermore, as named plaintiffs only include individuals  
28 covered by collective bargaining agreements, there is a possibility that they will fail to

1 fully protect the interests of employees not covered by one. See Falcon, 457 U.S. at 157  
2 n. 13.

3 Plaintiffs argue that the collective bargaining agreements are irrelevant because  
4 “Defendants make no evidentiary showing of any applicable collective bargaining  
5 agreement, a showing upon which any § 514 analysis necessarily turns.” However, this  
6 gets the burden backwards. “A party seeking class certification must affirmatively  
7 demonstrate his compliance with [Rule 23].” Dukes, 564 U.S. at 350. And this requires  
8 “evidentiary proof.” Comcast Corp., 133 S.Ct. at 1432. Plaintiffs have not provided such  
9 proof. Plaintiffs have not identified which of Defendant’s facilities are covered by  
10 collective bargaining agreements nor whether those agreements affect overtime  
11 compensation. In sum, Plaintiffs’ evidence does not establish that differences amongst  
12 the class members’ collective bargaining agreement are predominated by common  
13 questions. See Boeing Co., 225 F.R.D. at 637.

14 **B. Inaccurate Pay Statement Class**

15 Plaintiffs’ proposed Inaccurate Pay Statement Class includes “all current and  
16 former non-exempt employees of Defendants within the State of California who . . . were  
17 not provided with an accurate, itemized pay statement reflecting (1) all applicable hourly  
18 rates in effect during the pay period and the corresponding number of hours worked by  
19 the employee at each hourly rate, or (2) reflecting the name and address of the legal entity  
20 that is the employer.” (Doc. No. 48 at 2.) This class will allege that Defendant violated  
21 California Labor Code § 226 by providing employees with inaccurate pay statements.  
22 However, because Plaintiffs have not offered facts demonstrating that common questions  
23 predominate, the Court cannot certify the class. See Sali v. Universal Health Servs. of  
24 Ranch Springs, Inc., 2015 WL 12656937, \*9 (June 3, 2015 C.D. Cal.) (denying  
25 certification of wage statement class premised on the fact that defendants used a doing-  
26 business-as name on their paystubs because injury was “not amenable to common  
27 systems of proof”).

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1           1. Predmoniance

2           To establish the requisite element of predominance, Plaintiffs must show that  
3 “questions of law or fact common to class member predominate over any questions  
4 affecting only individual members.” Fed. R. Civ. P. 23(b)(3). This inquiry subsumes  
5 Rule 23(a)’s commonality analysis and is “even more demanding.” Comcast Corp. v.  
6 Behrend, 133 S.Ct. 1426, 1432 (2013). Based on the evidence before the Court,  
7 Plaintiffs’ analysis of § 226 involves various individualized issues that are not amenable  
8 to a class action under Rule 23(b)(3).

9           To prove a violation of § 226, Plaintiffs must show “(1) a violation of the statute;  
10 (2) the violation was knowing and intentional; and (3) an injury resulted from the  
11 violation.” Achal v. Gate Gourmet, Inc., 114 F.Supp.3d 781, 810 (N.D. Cal. 2015). Each  
12 of these elements is necessary, and a failure of proof is fatal. E.g., Elliot v. Spherion Pac.  
13 Work, LLC, 572 F.Supp.2d 1169, 1180 (C.D. Cal. 2008) (holding that plaintiff could not  
14 recover under § 226 because she did not suffer injury resulting from defendant’s “use of a  
15 slightly-truncated name”). Determining whether class members were injured by  
16 Defendant’s alleged violations will require an individualized analysis at odds with the  
17 principles of a class action. Sali, 2015 WL 12656937, \*9 (“The Court agrees that  
18 demonstrating that each class member was damaged by the claimed inaccuracy in the  
19 wage statement is a critical individualized issue in determining liability that is not  
20 amenable to common systems of proof.”); see also Delgado v. New Albertson’s, Inc.,  
21 2009 WL 10670628, \*10 (Dec. 15, 2009 C.D. Cal.) (“Finding injury for each class  
22 member would be a particularly daunting task and would require an individualized  
23 determination for each class member.”). Similarly, based on the evidence before the  
24 Court, the Court cannot say that assessing whether alleged violations were knowing and  
25 intentional is subject to common proof.

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1                   *i. Injury*

2                  To establish a violation of California Labor Code § 226, an employee must  
3 establish they suffered an injury resulting from the employer's inaccurate pay stub. Cal.  
4 Lab. Code. § 226 ("An employee *suffering injury* as a result of a knowing and intentional  
5 failure by an employer . . . is entitled to recover . . ."); Elliot v. Spherion Pac. Work,  
6 LLC, 572 F.Supp.2d 1169, 1180 (C.D. Cal. 2008) (holding that plaintiff could not  
7 recover under § 226 because she did not suffer injury resulting from defendant's "use of a  
8 slightly-truncated name"). The injury threshold is not high, see Jaimez v. DAIOHS USA,  
9 Inc., 181 Cal.App.4th 1286, 1306 (2010) ("a very modest showing will suffice"), but a  
10 failure to show injury is fatal. Where plaintiffs seek to certify a class-wide claim under  
11 § 226, they must show that a finding of injury is "amenable to common systems of  
12 proof." Sali, 2015 WL 12656937 at \* 9. If not, the class fails. Id.; see also Dukes, 564  
13 U.S. at 350 ("That common contention, moreover, must be of such a nature that it is  
14 capable of classwide resolution"). Various courts have denied class certification on the  
15 grounds that determination of injury requires individualized analysis. Sali, 2015 WL  
16 12656937, \*9 ("The Court agrees that demonstrating that each class member was  
17 damaged by the claimed inaccuracy in the wage statement is a critical individualized  
18 issue in determining liability that is not amenable to common systems of proof."); see  
19 also Delgado, 2009 WL 10670628, \*10 (Dec. 15, 2009 C.D. Cal.) ("Finding injury for  
20 each class member would be a particularly daunting task and would require an  
21 individualized determination for each class member."). The Court finds this case is no  
22 different.

23                  In their declarations, Plaintiffs state that they were confused by their paystubs. For  
24 example, David Foster declared that he "did not have an understanding of what amount  
25 of the service charge would be included in [his] check" and "was also never able to  
26 understand from looking at my pay check stubs how Centerplate determined how much  
27 service charge I was owed or for what shifts I was being paid service charges." (Doc.  
28 No. 48-5, Foster Declaration ¶ 5.) Similarly, Mark Allchin declared that he "never had

1 an understanding of hat amount of the service charge would be included in [his] check”  
2 and “was also never able to understand from looking at my pay check stubs how  
3 Centerplate determined how much service charge I was owed of for what shifts I was  
4 being paid service charge.” (Doc. No. 48-4, Allchin Declaration ¶ 3.) Some courts have  
5 held that employee confusion is sufficient to show an injury. See e.g., Delgado, 2009  
6 WL 10670628, \*3 (citing Elliot, 572 F.Supp.2d at 1181.) However, even if Foster and  
7 Allchin’s confusion is enough to establish injury to them personally, Plaintiffs offer no  
8 evidence that such confusion is uniform throughout the proposed class. Indeed, Plaintiffs  
9 offer no evidence of what other class members thought whatsoever. The only class-  
10 member evidence of understanding was provided by Defendant through a declaration of  
11 Wendy Marquez, who stated “[w]e get paystubs that show all of our hours worked” and  
12 also claimed she “never noticed any discrepancy between the amount I worked and the  
13 time I was pad.” (Doc. No. 58-11 at 11, Declaration of Wendy Marquez ¶ 11.) Ms.  
14 Marquez made no mention of being confused by her paystubs. (*Id.*) Thus, were the  
15 Court to rely on Plaintiffs’ confusion as the basis for their injury, there is no evidence this  
16 was uniform throughout the class and assessing injury would require individualized  
17 inquiries, not of the type contemplated by Rule 23 class actions. See Delgado, 2009 WL  
18 10670628, \*10 (Dec. 15, 2009 C.D. Cal.) (“Finding injury for each class member would  
19 be a particularly daunting task and would require an individualized determination for  
20 each class member.”).

21 Plaintiffs also argue they have met certain statutory requirements by which they  
22 are “deemed injured.” See Cal. Lab. Code § 226(2)(B). These provisions provide that:

23 (B) An employee is deemed to suffer injury for purposes of this subdivision  
24 if the employer fails to provide accurate and complete information as  
25 required by any one or more of the items (1) to (9), inclusive, of subdivision  
26 (a) and the employee cannot promptly and easily determine from the wage  
27 statement along one or more of the following:  
28

- (i) The amount of the gross wages or net wages paid to the employee during the pay period or any of the other information required to be provided on the itemized wage statement pursuant to items (2) to (4), inclusive, (6), and (9) of subdivision (a).
- (ii) Which deductions the employer made from gross wages to determine the net wages paid to the employee during the pay period. Nothing in this subdivision alters the ability of the employer to aggregate deductions consistent with the requirements of item (4) of subdivision (a).
- (iii) The name and address of the employer and, if the employer is a farm labor contractor, as defined in subdivision (b) of Section 1682, the name and address of the legal entity that secured the services of the employer during the pay period.
- (iv) The name of the employee and only the last four digits of his or her social security number or an employee identification number other than a social security number.”

Cal. Lab. Code § 226(e)(2)(B). Plaintiffs have not established a class-wide injury under any of these prongs.

Plaintiffs argue that class members were injured because Defendant’s “pay statements do not reflect all applicable hourly rates in effect during the pay period and the corresponding number of hours worked by the employee at each hourly rate.” Doc. No. 48-1 at 14.) Recently in Apodaca v. Costco Wholesale Corp., 675 Fed.Appx. 663 (9th Cir. 2017), the Ninth Circuit held that an employee’s hourly rate could be “promptly and easily determine[d] from the wage statement alone” by “dividing the amount paid by the hours worked.” Id. at 665. Because employer’s paystub included an amount paid and the number of hours worked, the Court found they had satisfied the hourly rates requirement of § 226(a). Id. As such, the Ninth Circuit affirmed the district court’s denial of certification for claims based on § 226. Id. The Apodaca holding is directly on point here. Defendant’s paystubs include the number of hours worked and the total amount of

1 compensation for those hours. (E.g., Doc. No. 48-4, Allchin Declaration ¶ 3 (“The pay  
2 check stub includes an “Overtime Rate” of \$8.10 per hour, and a payment totaling \$6.08  
3 for 0.5 hours of overtime.”)) Thus, at a minimum, an employee could promptly and  
4 easily determine their applicable hourly rate by “dividing the amount paid by the hours  
5 worked.” Apodaca, 675 Fed.Appx. at 665; see Reinhardt v. Gemini Motor Transport,  
6 879 F.Supp.2d 1138, 1142 (E.D. Cal.) (“if a claimant injury is based merely upon the  
7 plaintiff having to perform ‘simple math’ with the information already in his possession,  
8 then there is no cognizable injury.”)

9 Plaintiffs also argue that class members were injured because class members’  
10 paystubs included an inaccurate employer name and address. (Doc. No. 48-1 at 11.) The  
11 Court first notes that there is no evidence in the record that the address appearing on  
12 Plaintiffs’ paystubs is inaccurate. In his deposition, Winarski testified that the address on  
13 Allchin’s September 21, 2011 paystub was the headquarters of Volume Services, Inc. at  
14 the time. (Doc. No. 48-3, Winarski Deposition ln. 21:5-8; 20-25.) And Plaintiffs have  
15 offered no other evidence that Defendant’s address was incorrect. As such, Plaintiffs  
16 cannot argue injury arising from an inaccurate address.

17 Address aside, Plaintiffs’ argue class members’ paystubs are inaccurate because  
18 Defendant used its doing-business-as (“dba”) name of Centerplate Inc., rather than the  
19 name Volume Service, Inc. (Doc. No. 48-3 at 14.) California Labor Code § 226 is silent  
20 as to whether a dba name is sufficient. Id. (only requiring “name and address of the legal  
21 entity”). However, courts addressing the question have refused to find a per se violation  
22 when companies deviate from using their full legal name. E.g., Elliot v. Spherion Pac.  
23 Work, LLC, 572 F.Supp.2d 1169, 1179 (C.D. Cal. 2008) (finding no violation of § 226  
24 where defendant truncated its name on the wage statements); Delgado, 2009 WL  
25 10670628, \*4 (finding no violation of § 226 where defendant included the name  
26 “Albertson’s, a SUPERVALU Company” when Albertson’s was its dba name); York v.  
27 Starbucks Corp., 2009 WL 8617536, \*8 (Dec. 3, 2009 C.D. Cal.) (finding no violation of  
28 § 226 where defendant used its dba name “Starbucks Coffee Company”, rather than its

1 corporate name). When interpreting California's labor statutes, "words are to be given  
2 their plain and commonsense meaning." Apodaca, 675 Fed.Appx. at 665 (quoting  
3 Murphy, 40 Cal.4th at 1103). And as the Court in Elliot noted, § 226 does not require  
4 "an employer to state its 'complete' or 'registered' name" but "only requires the  
5 employer state its 'name and address.'" 572 F.Supp.2d at 1180. In light of federal court  
6 decisions, and in the absence of California state court cases on point, the Court cannot  
7 find a per se injury based on Defendants' use of "Centerplate, Inc." as its name. This was  
8 the name used throughout its operations in California and was accompanied by the  
9 correct address. And to the extent that Plaintiffs can allege some specific injury resulting  
10 from this aspect of the paystub, they have offered no evidence of a class-wide uniformity.

11 Finally, Plaintiffs argue that Defendant's pay statements are inaccurate because  
12 employee's compensation stemming from services charges is not included in the hourly  
13 rates. (Doc. No. 48-1 at 14.) Plaintiffs, however, do not cite any legal support for their  
14 claim that "applicable hourly rates" should include the service charges and the Court  
15 cannot find any. And in any event, Plaintiffs have not established that showing an  
16 employee's service charges were not included in their hourly rate is amenable to class  
17 proof. Winarski testified that how service charges were included in rates differed from  
18 location to location. (Doc. No. 58-10; Winarski Deposition ln. 22:20-23:3, 24:6-17.)  
19 This was in part because the locations various collective bargaining agreements could  
20 affect the calculations. (Id.) In light of these location-by-location differences, any  
21 analysis of whether Defendant's pay statements were inaccurate necessarily includes an  
22 individualized analysis.<sup>3</sup> And Plaintiffs have offered no evidence to the contrary. The  
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24

25 <sup>3</sup> It is possible that a common proof could be established on a location-by-location basis using  
26 subclasses. However, Plaintiffs offer insufficient evidence to support the certification of subclasses  
27 based on location—and, in any event, only have representatives from two of the seven locations. See  
28 Boeing Co., 225 F.R.D. 626, 637 (W.D. Wash. 2005) (declining to certify subclasses because plaintiffs  
did not provide sufficient information regarding the agreements' coverage); see also Upper Deck Co.,  
183 F.R.D. at 680-81 (party seeking certification must have "sufficiently identified and demonstrated the  
existence of the numbers of persons for whom they speak.").

1 only evidence of paystubs before the Court belong to Allchin and Foster. As the Court  
2 previously explained, Plaintiffs have failed to provide facts showing these paystubs are  
3 inaccurate as to the inclusion of service charges in overtime pay—and much less that they  
4 establish some class-wide injury.

5 For the foregoing reasons, the Court agrees with other district courts finding that a  
6 showing of class-wide injury would require individualized analysis inconsistent with  
7 Rule 23. See Sali, 2015 WL 12656937, \*9 (“demonstrating that each class member was  
8 damaged by the claimed inaccuracy in the wage statement is a critical individualized  
9 issue in determining liability that is not amendable to common systems of proof”);  
10 Delgado, 2009 WL 10670628, \*10 (Dec. 15, 2009 C.D. Cal.) (“Finding injury for each  
11 class member would be a particularly daunting task and would require an individualized  
12 determination for each class member.”).

13           *ii. Knowing and Intentional Acts*

14 Plaintiffs have also failed to show that proving that the alleged inaccurate  
15 statements were made knowingly and intentionally by Defendant is subject to common  
16 proof. To prove a violation of § 226, Plaintiffs must show that any violations were made  
17 knowingly and intentionally. Achal, 114 F.Supp.3d at 810. Section 226 defines  
18 “knowing and intentional” as follows:

19           (3) For purposes of this subdivision, a “knowing and intentional failure”  
20 does not include an isolated and unintentional payroll error due to a clerical  
21 or inadvertent mistake. In reviewing for compliance with this section, the  
22 factfinder may consider as a relevant factor whether the employer, prior to  
23 an alleged violation, has adopted and is in compliance with a set of policies,  
24 procedures, and practices that fully comply with this section.”

25 Cal. Lab. Code § 226(e)(3). Because class members’ paystubs are the product of  
26 multiple policies, procedures, and practices that differ from location to location—almost  
27 none of which have been addressed by Plaintiffs—the Court finds that common questions  
28 do not predominate this inquiry.

1 Winarski testified that employees' paystubs are a result of multiple policies,  
2 procedures, and practices that differ from location to location. For example, Winarski  
3 testified that the calculation of service charges, their amount and distribution, differed  
4 from location to location and were heavily impacted by the various collective bargaining  
5 agreements. (Doc. No. 48-3, Winarski Deposition ln. 31:19-32:6.) Furthermore, payroll  
6 is not handled centrally by Defendant at its headquarters but, rather, each location  
7 prepares their own payroll internally. (*Id.* ln. 44:11-23.) Notably, overtime rates were  
8 calculated separately by individuals at each location, based on the location-specific  
9 constraints. (*Id.* ln. 56:8-12.) These site-specific differences complicate any common  
10 proof of whether misstatements were knowing and intentional. For example, to the  
11 extent Plaintiffs seek to show that Defendant improperly reported a class members'  
12 overtime compensation, Plaintiffs will need to identify the location where the rate was  
13 calculated, who made the calculation, what policies and collective bargaining agreements  
14 were in place, and then make a factual showing that whoever made the calculation, or  
15 established the policy mandating the calculation, acted in way to knowingly and  
16 intentionally misstate it. This is not the type of common proof contemplated by Rule 23.  
17 Amchem, 521 U.S. at 622-24.<sup>4</sup>

18 **C. UCL Class**

19 Because the Court denies certification of the Overtime Class, the Late Pay  
20 Subclass, and the Inaccurate Pay Statement Class, the Court also denies certification of  
21 the derivative UCL Class. Plaintiffs' § Bus. & Prof. Code § 17200 claims are all  
22 derivative of overtime and inaccurate pay statements claims. As Plaintiffs have failed to  
23 show class certification is proper for the other classes, they similarly fail to support the  
24 UCL Class.

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26 <sup>4</sup> As previously noted, this type of proof might be susceptible to common proof via subclass, but  
27 Plaintiffs have not provided evidence to support a certification of subclasses based on location. See  
28 Boeing Co., 225 F.R.D. at 637; see also Upper Deck Co., 183 F.R.D. at 680-81 (party seeking  
certification must have "sufficiently identified and demonstrated the existence of the numbers of persons  
for whom they speak").

## **CONCLUSION**

For the foregoing reasons, the Court denies Plaintiffs' motion for class certification. Plaintiffs have not produced sufficient evidence to show that they have met the requirements for a class action under Rule 23. Pursuant to the Court's scheduling order, the parties were to complete discovery by January 12, 2017. (Doc. No. 37.) As this date has already passed, the record is fully complete. As such, the Court denies the motion for class certification.

## IT IS SO ORDERED.

DATED: August 4, 2017

Marilyn L. Huff  
Hon. Marilyn L. Huff

Hon. Marilyn L. Huff  
United States District Judge